

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1922~~ 1923

No. ~~141~~ 142

JOHN SWENDIG, JAMES W. MILLER, REMIGIUS GRAB,
ET AL., APPELLANTS,

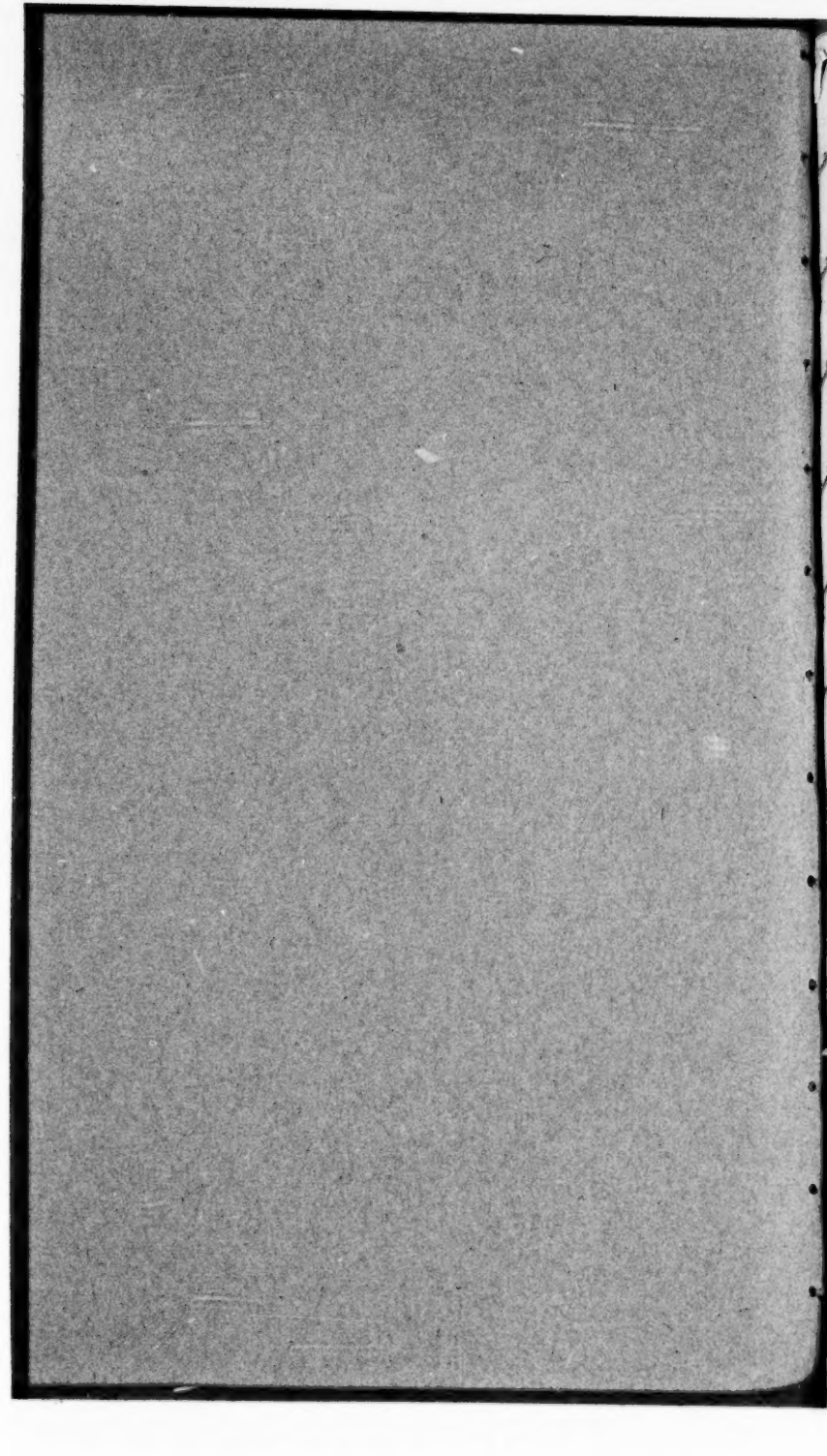
vs.

THE WASHINGTON WATER POWER COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

FILED OCTOBER 30, 1922.

(29,223)



(29,223)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 673.

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ET AL., APPELLANTS,

vs.

THE WASHINGTON WATER POWER COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

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IN THE
District Court of the United States for the District of Idaho,
Northern Division.

Consolidated Causes Nos. 752, 753, 754, and 755.

THE WASHINGTON WATER POWER COMPANY, a Corporation, Plaintiff,
vs.
JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB, ANTHONY KERR,
Defendants.

Complaint Against John Swendig.

[Filed May 18, 1920.]

The Washington Water Power Company, a corporation organized under the laws of the State of Washington, as plaintiff brings this bill of complaint against John Swendig, and for cause of action alleges:

I.

The plaintiff is now and was at all of the times mentioned in the complaint, a corporation created and existing under and by virtue of the laws of the State of Washington, having its principal place of business at Spokane, Washington, and now is, and was at all of the times mentioned in this complaint, a citizen of the State of Washington, and has at all of the times hereinafter mentioned fully complied with the laws of the State of Idaho relating to foreign corporations, and is now, and was at all of the times herein mentioned, authorized and empowered by virtue of such compliance with the laws of the State of Idaho to do business and to acquire and hold property in said State, and that under and by virtue of its articles of incorporation it is and at all of the times herein mentioned has been empowered to construct, acquire, own and operate electric power transmission lines and telephone lines in the State of Idaho.

That the defendant is a resident and citizen of the State of Idaho.

II.

That the jurisdiction of the United States District Court for the District of Idaho over this suit is invoked and depends upon the following grounds, to-wit:

(1) Upon the ground that the construction and application of the Act of February 15th, 1901, Chapter 372 (31 Statutes at Large, 790) entitled "An Act Relating to rights of way through certain parks, reservations, and other public lands"; and also the Act of March 3, 1901, (31 Statutes at Large, 1083) is involved; and also

11 the Act of June 21, 1906 (34 Statutes at Large, 335) is involved; and that the amount in controversy exceeds in value the sum of \$3,000, exclusive of interest and costs, all of which will appear from the facts hereinafter set forth. That the suit involves a claim to real property in the District of Idaho.

(2) On the ground that the plaintiff is a citizen and resident of the State of Washington and that the defendant is a citizen and resident of the State of Idaho, as appears by the first paragraph of this bill of complaint, and that the suit involves a claim of title to real property in the Northern Division of the District of Idaho, and the amount in controversy in this suit exceeds in value, exclusive of interest and costs, the sum of \$3,000.

III.

That the land described as Section 26, Township 47, N. R. 3, W. B. M., was formerly a part of the Cœur d'Alene Indian Reservation.

That prior to April 15, 1902, this plaintiff filed an application with the Department of the Interior of the United States of America for authority to construct a telephone line through and across the Cœur d'Alene Indian Reservation in the State of Idaho, which said right of way so applied for crossed, among other lands within said reservation, the land described as the Northeast quarter of Section 26, Township 47, N. R. 3 W. B. M., the said application being made in pursuance of Section 3 of the Act of Congress approved March 3,

12 1901, entitled "An Act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes."

That at that time the said lands were a part of the Cœur d'Alene Indian Reservation and were unsurveyed and not open to settlement.

The right, authority and permission to survey and locate and maintain a telephone line through and across the said Cœur d'Alene Indian Reservation and across the said Northeast quarter of Section 26, Township 47 N. R. 3, W. B. M., was on the 15th day of April, 1902, granted by the Honorable Secretary of the Interior upon condition that the company pay such damages and compensation by reason of the location and construction of said line as were thereafter assessed under the direction of said Secretary of the Interior, which said compensation was thereafter assessed and fixed by the said Secretary of the Interior at the sum of \$224, which said sum was by this plaintiff paid into the office of Indian Affairs under the said act of Congress above referred to.

That the said right of way and easement granted by the said Secretary of the Interior, as aforesaid, was over and across, together with other lands, the said Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

13 That the said grant and easement above mentioned has ever since been and now is a valid and subsisting grant and easement and in full force and effect.

IV.

That prior to July 7, 1902, this plaintiff filed an application with the Department of the Interior of the United States of America for a permit for a right of way across, and permission to construct and maintain an electric power transmission line over and across the Coeur d'Alene Indian Reservation. That said application was made in pursuance of the provisions of the Act of February 15, 1901, (31 Statutes at Large, 790). That the right, authority and permission applied for was given by the Honorable Secretary of the Interior under date of July 7, 1902, and the use of the right of way was permitted in accordance with the provisions of said act of Congress and the regulations thereunder.

That at that time the said lands over which the said right of way was sought were a part of the Coeur d'Alene Indian Reservation and were unsurveyed and not open to settlement.

That the said permit so given to this plaintiff by the Secretary of the Interior on the said 7th day of July, 1902, was over and across, together with other lands, the said Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

14 That the said permit above mentioned has ever since been and now is a valid and subsisting permit in full force and effect, and was issued long prior to any rights initiated by the defendant and long prior to the time when said lands were open to occupancy and settlement.

V.

That pursuant to the said permit, the plaintiff did construct over and across the said Coeur d'Alene Indian Reservation a high tension electric power transmission line extending from Spokane, Washington, to Burke, Idaho, and ever since on or about the 24th day of August, 1903, has been using the same for the purpose of supplying electric power and energy in the mining district of Shoshone County, Idaho, and that the said electric power transmission line is of great value, to-wit, of more than the value of \$25,000, and that the right to maintain the same and to exercise the rights of the plaintiff under the said permit is of the value of more than \$25,000, exclusive of interest and costs, and the value of the use of said line and of said right of way is of the value of more than \$25,000, exclusive of interest and costs.

VI.

That the said plaintiff, under its easement and right to construct a telephone line, did also construct over and across said right of way and upon the same poles as the electric power transmission line was constructed, a telephone line and has continued to operate
15 and maintain the same and use the same ever since on or about the 24th day of August, 1903. That the said telephone line is of great value, to-wit, of the value of more than the sum of \$5,000, and the right to maintain the same and to exercise the rights

of the plaintiff under the said permit is of the value of more than \$5,000, exclusive of interest and costs, and the value of the use of said line and of said right of way is of the value of more than \$5,000, exclusive of interest and costs.

VII.

That *is it necessary* for the plaintiff to patrol the said line and every part thereof, including that portion of the line which extends across the said Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M., and in order to do so the plaintiff, did, under its permit and as a necessary part of the construction and maintenance of said line, construct along the said power transmission line a patrol road, which said patrol road this plaintiff constructed during the years 1902 and 1903, and ever since has used the same, except as the use thereof has been interfered with by the acts of the defendant, as hereinafter set forth.

That the said patrol road is necessary in order for the patrolmen to pass along the said power transmission line for the purpose of watching the same, keeping the same in working condition and in the event of accident or injury thereto for the purpose of repairing or renewing the same, and is covered by the said easement and also by the said permit.

VIII.

That the said power transmission line, telephone line and patrol road have not been changed whereby they would differently affect the said Northeast quarter of Section 26, Township 47 N. R. 3, W. B. M., since the year 1903.

IX.

That by virtue of said facts, this plaintiff became vested by virtue of its said permit with the right to maintain and operate its said electric power transmission line as provided in the said permit, and that by virtue of such facts, the defendant, took whatever right, title or interest was vested in him by the Government of the United States by virtue of said permit to said land subject to the permit granted by the government of the United States to this plaintiff and the permit to use the said lands in connection with its said power transmission line and the rights of the defendant are subsequent to and subject to the rights of this plaintiff under and by virtue of said permit above described, which has never been revoked and remains in full force and effect.

That also by virtue of said facts, this plaintiff became vested by virtue of its said easement to use said land in connection with its telephone line, as provided in said easement, and that by virtue of such fact the defendant took whatever right, title or interest was vested in him by the Government of the United

States by virtue of said patent to said land, subsequent and subject to the easement granted by the Government of the United States to this plaintiff and the easement to use said land in connection with its said telephone line, and the rights of the defendant are subsequent to and subject to the right of this plaintiff under and by virtue of said easement above described, which has never been revoked and which remains in full force and effect.

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric power transmission line, of said telephone line and of said patrol road along the same, the defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335), provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 2nd day of May, 1910, the defendant made a homestead filing upon the land described as the Northeast
18 quarter of Section 26, Township 47 N., R. 3 W. B. M., and thereafter made final proof on or about the 3rd day of May, 1913, and thereafter patent of the United States was issued therefor on or about the 30th day of October, 1913, and the defendant holds under said title.

XI.

That at the time said lands were settled upon by the defendants as also at the time the said lands were selected and filed upon by the said defendant, and at all times since, the said permit and said easement of this plaintiff, and each thereof were in full force and effect, and said power line, telephone line and patrol road had been constructed over and across said lands, and at all of said times were used by the said plaintiff and any rights acquired by the said defendant were subsequent to and inferior to the plaintiff's easement, and subject to and inferior to plaintiff's said permit.

That at and before the defendant settled upon or filed upon said lands or initiated any rights thereto, the said power transmission line, telephone line and patrol road were constructed over and across said lands and the plaintiff was maintaining and operating its said lines and the said defendant at the time of acquiring any right had full notice and knowledge of said plaintiff's said easement and that the plaintiff was operating the said telephone line thereunder, and
19 also had full notice and knowledge of the plaintiff's said permit and that the plaintiff was maintaining and operating its said electric power transmission line, and for the purpose of

caring for the same and patrolling the same, renewing and repairing the same, had constructed and was using the said patrol road, and that the said telephone line, electric power transmission line and patrol road crossed, among other lands, the said lands described as the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.

That the said defendant acquired any rights by virtue of his settlement and filing upon said lands with full knowledge of all such facts and the patent issued by the Government of the United States therefor was subject to the rights of this plaintiff both under said permit and said easement.

XII.

That the said permit so granted unto this plaintiff for the maintenance of said electric power transmission line as also the easement and rights to this plaintiff for a right of way for said telephone line granted under the said two acts of congress, heretofore referred to, were prior to any right acquired by the defendant, and the settlement and initiation of the rights of the defendant on said lands was subsequent to the plaintiff acquiring the said rights by virtue of the said permit and by virtue of said easement, and the subsequent patent of said lands to the said defendant by the United States Government under and by virtue of the Act of June 21, 1906, did
20 not affect, revoke or annul either the said permit or the said easement, and the plaintiff has at all times since the granting thereof had the right to operate and maintain the same, and has had the right to patrol the same and to maintain for that purpose the said patrol road along the same. That the said patrol road is a necessary incident to the maintenance of said power transmission line.

XIII.

That the said defendant, since acquiring his interest in said lands, has extended a fence across said rights of way on the east of the section line of said Section 26, and another fence approximately along the north and south quarter line of said Section 26, Township 47 N., R. 3 W. B. M., and has so constructed the said fences and wired the same up as to prevent this plaintiff and its employes from driving along the same or passing along the same with any vehicle or horse, and has closed up said patrol road and declines and refuses to permit this plaintiff to patrol the same and has notified the employes of this plaintiff that they should not go upon the said land to repair the said lines or the poles or to otherwise maintain the same, and gives out and threatens that he will prevent the plaintiff or its employes from going along the same or repairing the said transmission line and telephone, all of which is in violation of the rights
21 of this plaintiff granted as aforesaid; and has ordered this plaintiff and its employes in the future not to go upon said lands for the purpose of repairing said lines.

XIV.

That the said homestead entry and settlement of the defendant and the said patent of the United States issued pursuant thereto were all subject to the rights of this plaintiff and the issuance of said patent by the Government of the United States did not modify, annul, revoke or cancel either the said permit or the said easement.

That the said defendant has prevented the employes of this plaintiff from driving along said right of way and patrolling the same in a proper manner, and threatens to continue said conduct in the future, and has warned the employes of this plaintiff not to go upon said land to repair the said power transmission line and telephone line or either thereof, or the poles upon which the same are strung, and threatens to continue such conduct in the future, all of which will seriously impede and interfere with the performance of its duties as a public service corporation by the plaintiff and prevent it from enjoying its rights under the said permit and under said easement.

That this plaintiff is engaged in furnishing power for the use of the mines of the Coeur d'Alene mining district and for the use of the inhabitants of that district for light and power, and furnishing light for municipal use, and the acts of the defendant do interfere with and will interfere with the discharge of those duties.

Wherefore, plaintiff prays:

(1) That this court may issue its injunction perpetually enjoining and restraining the said defendant and all persons acting under his authority or pretending so to act, and all successors in interest of said defendant, from interfering with this plaintiff in operating and maintaining the said electric power transmission line and the said telephone line and the said patrol road over and across the Northeast quarter of Section 26, Township 47 N., R. 3, W. B. M., and from passing along and over the said patrol road;

(2) That the said defendant, his agents, servants and employes, be restrained during the pendency of this action from interfering with this plaintiff in operating and maintaining the said electric power transmission line and the said telephone line and the said patrol road over and across the Northeast quarter of Section 26, Township 47 N., R. 3, W. B. M., and from passing along and over said patrol road;

(3) That this court shall decree that the said permit and the said easement and each thereof are in full force and effect and that the said patent of the United States did not annul, revoke or modify or affect the rights of this plaintiff thereunder.

(4) Plaintiff also prays for its costs and for general equitable relief. John P. Gray, W. F. McNaughton, Attorneys for Plaintiff. Residence and P. O. Address, Coeur d'Alene, Idaho.

STATE OF IDAHO,
County of Spokane, ss:

V. G. Shinkle, being first duly sworn, on his oath deposes and says:

That he is the Treasurer of The Washington Water Power Company, the plaintiff in the above entitled action and makes this verification for and on behalf of said plaintiff, and is duly authorized so to do; that he has read the foregoing complaint, knows the contents thereof and that he believes the facts therein stated to be true. V. G. Shinkle.

Subscribed and sworn to before me this 14th day of May, 1920.
S. C. Scott, Notary Public for Washington, residing at Spokane, Washington. (Notary Seal.)

[File endorsement omitted.]

24

In United States District Court.

(Title of Court and Cause.)

Complaint Against James W. Miller.

[Filed May 18, 1922.]

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric transmission line, of said telephone line and of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335) provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 4th day of May, 1910, the defendant made a homestead filing upon the land described as the North half of the Southwest quarter and the East half of the Northwest quarter of Section 26, Township 47 N., R. 3, W. B. M., and thereafter made final proof on or about the 3rd of June, 1913, and thereafter patent of the United States was issued therefor on or about the 23rd day of January, 1913, and defendant holds under said title.

[File endorsement omitted.]

25

In United States District Court.

(Title of Court and Cause.)

Complaint Against Remigus Grab.

[Filed May 18, 1922.]

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric power transmission line, of said telephone line and of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335), provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 7th day of May, 1910, the defendant made a homestead filing upon the land described as the Northeast quarter of Section 24, Township 47 N., R. 3 W. B. M., and thereafter made final proof on or about June 24, 1912, and thereafter patent of the United States was issued therefor on or about the 24th day of September, 1912, and the defendants holds under said title.

[File endorsement omitted.]

26

In United States District Court.

(Title of Court and Cause.)

Complaint Against Tony Kerr.

[Filed May 18, 1920.]

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric power transmission line of said telephone line and of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335), provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation,

and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 22nd day of December, 1910, the defendant made a homestead filing upon the land described as Lot 2, and the Southeast quarter of the Northwest quarter and the Southwest quarter of the Northeast quarter and the Northwest quarter of the Southeast quarter of Section 19, Township 47 N., R. 2 W. B. M., and thereafter made final proof September 28, 1917, and thereafter
27 patent of the United States was issued therefor on or about the 15th day of October, 1918, and the defendants hold under said title.

[File endorsement omitted.]

In United States District Court.

(Title of Court and Cause.)

Answer of John Swendig.

[Filed Oct. 7, 1920.]

Comes now the defendant and for answer to plaintiff's alleged cause of action, admits, denies and alleges as follows:

I.

Admits all of paragraph I of plaintiff's complaint.

II.

Answering paragraph III of plaintiff's complaint, defendant admits that the land described as Section 26, Township 47, N. R. 3 W. B. M., was formerly a part of the Coeur d'Alene Indian Reservation.

As to whether or not, "Prior to April 15, 1902, plaintiff filed an application with the Department of the Interior of the United States of America for authority to construct a telephone line through and across the Coeur d'Alene Indian Reservation in the State of Idaho, which right of way so applied for crossed, among other lands within said reservation the land described as the Northeast quarter of Section 26, Township 47, N. R. 3. W. B. M., the said application being made in pursuance of Section 3 of the Act of
28 Congress approved March 3, 1901, entitled, 'An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian Tribes for the fiscal year ending June 30, 1902, and for other purposes,' defendant has no information or knowledge sufficient to enable him to answer, therefore he denies each and every allegation thereof, and each and every allegation in said paragraph contained, and denies that prior to April 15, 1902, or prior to any

other date, or on any other date, plaintiff filed an application with the Department of the Interior of the United States, or with any other department of the United States, for authority to construct a telephone line through and across, or through or across the Coeur d'Alene Indian Reservation in the State of Idaho, and denies that said right of way so applied for, if applied for, crossed among other land within said reservation, the land described as the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., and denies that said application, or any other application, "was made in pursuance of Section 3 of the Act of Congress approved March 3, 1901, entitled, 'An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian Tribes for the fiscal year ending June 30, 1902, and for other purposes,' "or that said application

29 or any other application for said permit, or any application for any permit to construct a telephone line across the Coeur d'Alene Indian Reservation, which permit was also over and across said land, was ever filed, by or in behalf of plaintiff, with the Department of the Interior of the United States, or with any other department of the United States, pursuant to said above-mentioned act, or pursuant to any other act or acts of Congress whatsoever.

Denies that the right, authority and permission, or the right, authority, or permission, or any other right, authority or permission, to survey, locate and maintain, or to survey, locate or maintain a telephone line through and across, or through or across the Coeur d'Alene Indian Reservation, or across said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.; was, on the 15th day of April, 1902, or on any other day, or date, granted to plaintiff or any person in its behalf by the Honorable Secretary of the Interior, or by any other person having lawful authority to grant such right, authority or permission, upon condition that plaintiff pay such damages and compensation by reason of the location and construction of said line as were thereafter assessed under the direction of said Secretary of the Interior, or upon any other condition or conditions, or at all; denies that said compensation, or any other compensation, was thereafter assessed and fixed, or assessed or fixed, by said Secretary of

30 Interior, or by any other person having lawful authority to so assess or fix such compensation, at the sum of Two Hundred Twenty-four (\$224.00) Dollars, or was assessed and fixed, or assessed or fixed, by said Secretary of the Interior, or any other person having lawful authority to so assess or fix such compensation, at any other sum or sums whatever, or at all; and denies that plaintiff, or any person in its behalf, paid into the office of Indian Affairs, or into any other office of the United States, under said Act of Congress, above referred to, or under any other act or acts of Congress, or at all, the sum of Two Hundred Twenty-four (\$224.00) Dollars, or any other sum or sums whatever for any permit, right or authority, to survey, locate and maintain, or to survey, or locate, or maintain, a telephone line through and across, or through or across the Coeur d'Alene Indian Reservation, which permit, right or authority crossed the above-described land.

Denies that the said right of way and easement, or said right of way or easement, or any other right of way or easement, granted by the Secretary of Interior, or by any other person having lawful authority to grant such rights of way or easements, was over and across, or over or across, together with other lands the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., and further denies that any right of way or easement, whatsoever, has

31 ever been granted by the Secretary of Interior, or any other person having lawful authority to grant the same, to plaintiff, or any person in its behalf, or to any other person, to go upon said land or any part thereof for the purpose of constructing, locating, or maintaining any telephone line or lines whatsoever.

Denies that said grant and easement, or said grant or easement above-mentioned, or any other grant and easement, or any other grant or easement has ever since been and now is, or has ever been, or not is, a valid and subsisting grant and easement in full force and effect, or a valid or subsisting grant and easement in full force and effect, or a valid and subsisting grant or easement in full force and effect, or a valid or subsisting grant or easement in full force and effect, or a valid or subsisting grant or easement in force or effect.

III.

Answering paragraph IV of plaintiff's complaint, defendant says that as to whether or not, "Prior to July 7, 1902, this plaintiff filed an application with the Department of the Interior of the United States of America for a permit for a right of way across, and permission to construct and maintain an electric power transmission line over and across the Coeur d'Alene Indian Reservation. That said application was made in pursuance of the provisions of the Act of February 15, 1901, (31 Statutes at Large, 790)" defendant has no sufficient information or knowledge to enable him to answer, there-

32 fore and upon that ground, denies each and every allegation thereof and each and every allegation in said paragraph contained, and denies that prior to July 7, 1902, or prior to any other date, or on any other date or day, plaintiff, or any person in its behalf, filed an application with the Department of the Interior of the United States, for a permit for a right of way across, and permission to construct and maintain, or for a permit for a right of way across or permission to construct or maintain, or for a permit for a right of way across or permission to construct or maintain an electric power transmission line over and across, or over or across, the Coeur d'Alene Indian Reservation, which right of way was also over the above-described land; and denies that said application, or any other application for said purposes, was made in pursuance of the provisions of the Act of February 15, 1901 (Statutes at Large, 790), or that any application, whatsoever, was made, by plaintiff, or any person in its behalf, in pursuance of any other Act of Congress, for a permit for a right of way, or permission to construct and maintain, or permission to construct or maintain, an electric power transmission line over and across, or over or across, the Coeur d'Alene In-

dian Reservation, which right of way was also over the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.; and denies that the right, authority and permission, or right, authority or permission, applied for, if applied for, or any other right, authority and permission, or any other right, authority or permission, was given by the Honorable Secretary of the Interior, or by any other person having lawful authority to grant such right, authority, and permission, or such right, authority or permission, under date of July 7, 1902, or under any other date, or at all, and further denies that the use of the right of way, or the use of any other right of way, whatsoever, was permitted in accordance with the provisions of said Act of Congress and the regulations thereunder, or in accordance with the said Act of Congress or the regulations thereunder, or was permitted in accordance with any other provisions of said Act of Congress, or any provisions of any other Act of Congress, or was permitted at all.

Admits that the above-described land, of this defendant, was a part of the Coeur d'Alene Indian Reservation, and in the year of 1902, was unsurveyed and was not open to settlement, but denies that any right of way was ever sought by plaintiff, or any person in its behalf, or by any other person, over and across, or over or across, said land for any purpose, or purposes whatsoever.

Denies that said permit, or any other permit, so given, or in any other manner given to this plaintiff, or any person in its behalf, or any other person whatsoever, by the Secretary of Interior, or any other person having lawful authority to give such permits, on the 7th day of July, 1902, or on any other date, was over and across, or over or across, the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.

And denies that the said permit above-mentioned, or any other permit, whatsoever, for said purposes, or for any other purposes, has ever since been and now is, or has ever been, or now is, in full force and effect, or in full force or effect; and further denies that said permit, or any other permit, whatsoever, was issued to plaintiff, or any other person, prior to the time when said lands were open to occupancy and settlement, or prior to the time when said lands were open to occupancy or settlement, or prior to any rights initiated by the defendant, or subsequent to said times, or at all.

IV.

Denies that pursuant to the said permit, or that pursuant to any other permit, the plaintiff did construct over and across, or over or across the Coeur d'Alene Indian Reservation a high tension electric power transmission line, and further denies that plaintiff ever had any permit, whatsoever, to construct over and across, or over or across, said reservation, or said land, a high tension electric power transmission line, or any other line.

Admits that plaintiff did construct, and is now maintaining a high tension electric power transmission line across the land that was formerly the Coeur d'Alene Indian Reservation, and particularly

across the above-described land of this defendant but denies that it
ever had, or now has, any permit to so construct and main-
tain, or construct or maintain, said line across the land afore-
said; and admits that the right to maintain the same is of
the value of more than Twenty-five Thousand (\$25,000.00) Dollars,
but denies that plaintiff has ever had or now has any right to so
maintain said line; and denies that plaintiff has any right under
said permit, if such permit ever existed, or under any other permit
relating to the land that was formerly part of said reservation and
now belongs to this defendant; and further denies that the right to
exercise the rights of plaintiff under said permit, is of the value of
Twenty-five Thousand (\$25,000.00) Dollars, or any part thereof, or
that the right of plaintiff, as relating to said land, is of the value
of any other sum or sums, whatever.

V.

Denies that said plaintiff, under its said easement and right to
construct a telephone line, or under its said easement or right to
construct a telephone line, or under any other right and easement,
or right or easement, to construct a telephone line across said lands,
did also construct over and across, or over or across said right of way
and upon the same poles, or over or across said right of way, or on
the same poles, as the electric power transmission line was con-
structed, a telephone line. Admits that plaintiff did construct a
telephone line over and across the said lands and upon the same
poles, as the electric power transmission line, and admits that
plaintiff has been using the same for some time past, but
denies that plaintiff ever had any authority, or permit, or
right, whatsoever, to so construct said telephone line or any other
line across the said lands. Admits that the right to maintain said
telephone line is of great value, but denies that plaintiff has any
right whatsoever to so maintain the same, or ever had any right to
construct the same, upon said land.

VI.

Denies that it is necessary for the plaintiff to patrol the said lines
and every part thereof, or said line or any part thereof; and denies
that it is necessary for the plaintiff to patrol that portion of the said
line which extends across the Northeast quarter of Section 26, Town-
ship 47 N., R. 3 W. B. M.; denies that, in order to patrol said line,
the plaintiff did, under its permit and as a necessary part of the
construction and maintaining of said line, or under its permit or as
a necessary part of the construction and maintaining of said line,
or under its permit or as a necessary part of the construction or main-
taining of said line, or at all, construct along the said power trans-
mission line a patrol road, which said patrol road was constructed
during the years of 1902 and 1903, or during the year of 1902 or
1903, or during any other year or years, or at all; denies that plain-
tiff has used said patrol road, or any part thereof, or any other patrol

37 road, since said time, or any part thereof; or at all; and further denies that plaintiff ever had, or now has, any permit, or right whatsoever, to construct said power transmission line, telephone line, or patrol road, or that plaintiff ever had, or now has, any right whatsoever, to maintain the same upon said land of this defendant, and denies that said patrol road is a necessary part of the constructing and maintaining, or the constructing or maintaining said power line and telephone line or either of them.

Denies that said patrol road, or any part thereof, or any other patrol road, is covered by said easement and also by the said permit, or is covered by said easement or by the said permit, or by any other easement and permit, or by any other easement or permit, whatsoever; and further denies that plaintiff now has or has ever had any easement or permit of any kind or nature in any manner connected with the aforementioned land of this defendant.

VII.

Denies that by virtue of said facts, or by virtue of any facts, this plaintiff became vested by virtue of its said permit, or by virtue of any other permit, with the right to maintain and operate, or the right to maintain or operate its said electric power transmission line, or any other line, as provided in the said permit, if said permit ever existed, or any other permit, or at all; and denies that by virtue of

38 such facts, or by virtue of any other facts, the defendant took whatever right, title or interest that was vested in him by the government of the United States subject to the permit granted by the Government of the United States to plaintiff, or subject to any other permit granted by the United States to this plaintiff, or to any other person or persons, or subject to any permit, whatever, granted by any other person or persons having lawful authority to grant such permits; and denies that the title or interest of this defendant, in said land is subject to the permit, or any other permit, to use the said lands in connection with plaintiff's power transmission line; and further denies that the rights of defendant are subsequent to and subject to, or are subsequent to or subject to, the rights of this plaintiff under and by virtue, or under or by virtue, of said permit above described, or any other permit; and further denies that plaintiff now has, or ever had, any permit, right or rights, whatsoever, to use the above-described land in any manner; and denies that plaintiff's permit, if plaintiff ever had a permit, has never been revoked; and further denies that said permit is in full force and effect, or is in full force or effect, or is in force and effect, or has ever been in force or effect, upon the land of this defendant.

Denies that by virtue of said facts, or by virtue of any other facts, this plaintiff became vested by virtue of its said easement, or by virtue of any easement, to use said land in connection with its

39 telephone line, as provided in said easement, or any other easement, or at all; and denies that by virtue of such facts, or by virtue of any facts, the defendant took whatever right, title or interest that was vested in him by the Government of the United

States by virtue of said patent, subsequent to and subject to, or subsequent or subject to, the easement granted by the Government of the United States, or subject to any other easement granted to this plaintiff by any person, whatsoever, having lawful authority to grant such easements; and further denies that the easement, or any other easement, to use said land in connection with said telephone line has ever been granted to this plaintiff or any person in its behalf, or at all, by any person, persons, or state having the lawful authority to grant such easements across the land in question; and denies that the rights of the defendant are subsequent to and subject to, or are subsequent or subject to, the right of this plaintiff under and by virtue, or under or by virtue of said easement, or any other easement, or are subject to the rights of this plaintiff in any other manner, and further denies that plaintiff has any rights, whatsoever, in any wise connected with the said land of this defendant; and denies that said easement has never been revoked, and denies that it remains in full force and effect, or in full force or effect, or in force or effect; and further denies that any such easement, has ever been, or

40 now is, in force or effect.

VIII.

Denies that at the time of the issuance of said permit, if said permit was ever issued, to this plaintiff, or any person in its behalf, or at the time of the issuance of said easement, if said easement was ever issued, to this plaintiff, or at the time of the construction of said electric power transmission line, or at the time of the construction of said telephone line, or at the time of the construction of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

Admits that on or about the 2nd day of May, 1910, the defendant made a homestead filing upon the land described as the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., and thereafter made final proof on or about May 3, 1913, and thereafter patent of the United States was issued to defendant therefor on or about the 30th day of October, 1913, and that defendant holds under said title.

IX.

Denies that at the time said lands were settled upon by the defendant as also at the time the said lands were selected and filed upon by him, and at all times since, or at any of said times, the said permit and easement, or said permit or easement of this plaintiff, or any of them were in full force and effect, or were in full force

41 or effect, or were in force or effect, and denies that at said times, or at any of said times, said power line, telephone line and patrol road, or any of them, had been constructed over and across, or over or across, said lands, and denies that at any of said times, said telephone line or said power line, or said patrol road were used by the said plaintiff, and further denies that any rights acquired by the said defendant were subsequent to and inferior to, or were

subsequent to or inferior to plaintiff's easement, or were subject to and inferior to, or subject to or inferior to plaintiff's said permit, or that defendant's right- were in any manner, whatever, subject to any rights of plaintiff, or are now subject to any such rights; and further denies that plaintiff ever had, or now has, any right or rights, whatever in, over or to the land now belonging to this defendant.

Denies that at and before, or at or before, the defendant settled upon or filed upon said lands or initiated any rights thereto the said power transmission line, telephone line or patrol road were constructed over and across, or over or across, said lands; and denies that the plaintiff was maintaining or operating, or was maintaining and operating its said lines at the times aforesaid, or any of them; and denies that the said defendant at the time of acquiring any right had full notice and knowledge, or notice or knowledge, of plaintiff's said easement; and denies that the plaintiff was operating the said telephone line thereunder at the times aforesaid, or that plaintiff had any such easement at said times, or at any other times or time; and denies that defendant had full notice and knowledge, or notice or knowledge of the plaintiff's said permit, or any other permit, and further denies that plaintiff ever had, or now has, a permit to go upon said land for the purposes of said telephone line, electric power transmission line, or patrol road, or for purposes in anywise connected with the same or for any other purpose, or at all; and denies that for the purpose of caring for the said lines and for patrolling the same, renewing and repairing the same, or for any of said purposes, or for any other purposes, plaintiff had constructed and was using the said patrol road, or had constructed or was using the same; and denies that at the times aforesaid, or any of them, the said telephone line, electric power transmission line or patrol road crossed, the said lands described as the Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

Denies that the said defendant acquired any rights by virtue of his settlement and filing or by virtue of his settlement or filing upon said lands with full knowledge or any knowledge of all or any such facts; and further denies that they are facts; and denies that the patent issued by the Government of the United States, therefore was subject to the rights of this plaintiff either under said permit, or any permit, or at all, or under said easement, or any easement, or at all; and further denies that plaintiff now has, or has ever had, any rights whatsoever, in any manner connected with the said land of defendant for any purpose or purposes, or at all.

X.

Denies that said permit so granted, or any permit granted to this plaintiff, or any person in its behalf, or to any other person whatsoever, for the maintenance of said electric power transmission line or the easement and rights, or easement or rights, of this plaintiff, for a right of way for said telephone line, or any other telephone line, granted under said two acts of Congress, or granted under any other

act or acts of Congress, were acquired prior to any right acquired by defendant; and denies that the settlement and initiation, or the settlement or initiation, of the rights of the defendants on said lands was subsequent to the plaintiff acquiring the said rights by virtue of the said permit and by virtue of said easement, or either of them; and further denies that said patent was subsequent to plaintiff acquiring said rights by virtue of said permit or by virtue of said easement, or that said patent was subsequent to or subject to any right, easement, or permit given to this plaintiff, or otherwise acquired by

44 it in any manner whatsoever; and further denies that plaintiff ever had, or now has any such right, or any other right, or rights in anywise connected with said land; and denies that said patent did not effect, revoke and annul, or did not effect, or revoke, or annul, either the said permit or the said easement, if either ever existed; and denies that the plaintiff has at all times since the granting thereof, or at any of said times, had the right to operate and maintain or the right to operate or maintain the same, or ever had, or now has, any such right; and denies that plaintiff has had or now has the right to patrol the same or to maintain for that purpose the said patrol road along the same; and further denies that said patrol road is a necessary incident to the maintenance of said power transmission line, or is a necessary incident to any other right or rights of this plaintiff; and further denies that plaintiff ever has had or now has, any such rights or any rights whatsoever, in, over, or to said land.

XI.

Denies that the extension of any fence across the right of way now occupied by plaintiff's line, or the building or extending of any fence or fences in any manner whatever on the land of this defendant above-described, has deprived or will deprive plaintiff of any rights whatsoever, now held or at any time held or owned by said plaintiff, which rights are in any manner connected with said land; and further denies that plaintiff now has, or has ever had any right in,

45 to, or over the lands aforementioned; and denies that any act or acts of defendant in any manner connected with the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., has, or will deprive this plaintiff of any right or rights whatsoever.

XII.

Denies that the said homestead entry and settlement, or either of them, of the defendant and the said patent of the United States issued pursuant thereto, were all, or any of them subject to the rights of plaintiff; and denies that said patent did not modify, annul, revoke and cancel the said permit and said easement and each of them.

And denies that the acts, or conduct of this defendant, in any manner connected with said land, will, or has deprived or prevented plaintiff from enjoying its rights under the said permit and under the said easement, or either of them, and denies that plaintiff now

has or has ever had any right, or rights whatsoever in any manner connected with the aforementioned land, for any purpose or purposes, or at all; and further denies that plaintiff now has, or has ever had any permit or easement to go upon or occupy said land for any purpose or purposes, whatsoever.

For a further, second, separate and affirmative defense to plaintiff's alleged cause of action, defendant alleges:

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I.

That at all times herein mentioned, defendant has been and now is a citizen of the United States of America, over the age of 21 years; and now is and during all the times hereinafter mentioned has been, a citizen of the United States and of the State of Idaho.

II.

That prior to the 2nd day of May, 1910, the land mentioned in plaintiff's complaint, and described as the Northeast quarter of Section 26; Township 47 N.; R. 3 W. B. M., Kootenai County, Idaho, was a part of the unappropriated Public Domain of the United States; and thereafter and on or about the 2nd day of May, 1910, defendant duly, regularly and in conformity with the law made a homestead filing upon said land; and thereafter, and on or about the 3rd day of May, 1913, duly and regularly made final proof upon said land; and thereafter and on or about the 30th day of October, 1913, a patent for the land described as, the Northeast quarter of Section 26; Township 47 N.; R. 3 W. B. M., was duly and regularly issued by the United States of America to this defendant.

III.

That said patent, so issued, from the United States to this defendant, conveyed all the right, title and interest of said grantor in and to said land to this defendant, free from all permits, licenses, easements and se-vitudes of whatsoever kind or nature, except,

47 "Any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and therein reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder," and is in words and figures as follows:

Coeur d'Alene 03983. 4-1023.

The United States of America to all whom these presents shall come,
Greetings:

Whereas, a Certificate of the Register of the Land Office at Coeur d'Alene, has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant, John Swendig, according to the provisions of the Act of Congress of April 24, 1820, entitled, "An Act making further provision for the sale of the Public Lands" and the acts supplemental thereto, for the North-east quarter of Section twenty-six in Township forty-seven north of range three west of the Boise Meridian, Idaho, containing one hundred sixty acres, according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor-General.

Now know ye, That the United States of America, in consideration of the premises and in conformity with the several Acts of
48 Congress in such cases made and provided, has given and granted, and by these presents does give and grant, unto the said claimant and to the heirs of the said claimant the Tract above described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder.

In testimony whereof, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the Thirtieth
49 day of October, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the United States the one hundred and thirty-eighth. By the President.
Woodrow Wilson, By M. P. Le Roy.

Recorded: Patent Number 363,017. L. A. C. Lamar, Recorder of the General Land Office.

IV.

The defendant has, at all times since the issuance of said patent, held title to said lands, therein described, under said patent and has owned, possessed and occupied said premises under said patent and grant and in accordance with the title and rights thereby granted, conveyed and conferred, and now so holds the same.

Wherefore defendant prays:

That the plaintiff's action be dismissed and it take nothing thereby and that defendant be given his costs and disbursements herein. J. F. Ailshie, Ray Agee, Attorneys for Defendant, Residence and Post Office Address, Coeur d'Alene, Idaho.

STATE OF IDAHO,

County of Kootenai, ss:

John Swendig, being first dhly sworn, on his oath deposes and says:

50 That he is the defendant in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and believes the facts therein stated to be true. John Swendig.

Subscribed and sworn to before me this 23rd day of October, 1920. M. W. Frost, Notary Public, in and for the State of Idaho, Residing at Harrison, Idaho. (Seal.)

[File endorsement omitted.]

In United States District Court.

(Title of Court and Cause.)

Motion to Dismiss.

[Filed June 7, 1920.]

Now comes the defendant and moves the Court to dismiss plaintiff's pretended action herein for the reasons and upon the grounds following:

I.

That the complaint does not state facts sufficient to entitle plaintiff to any relief whatever. That it appears upon the face of the complaint that defendant holds a patent from the United States for the fee simple title and Estate in and to the whole of the lands over which plaintiff's pole, power and telephone line extends, and that at the time of the issuance of said patent the United States made no reservation of title whatever, either to itself or for the use or benefit of plaintiff or any one else for a power line, telephone or pole
51 line of any kind. That it appears upon the face of the Complaint that plaintiff has no grant or easement of any kind from the defendant's grantor the United States, or from defendant or any one to go upon or maintain its pole, power or telephone line on or across defendant's land.

II.

That the Honorable Secretary of the Interior had no power or authority of law to give or convey title, or an easement or an irrevocable license to plaintiff for the purpose of maintaining a power, pole, telephone, transmission or other lines across said lands and that he did not and could not do so and that the United States has parted with all its right and title in and to said lands and that by said grant the Honorable Secretary of the Interior has lost all power of control or supervision over said land and any license or permit to any one to go upon or across the same has been thereby revoked and that the issuance of patent was a revocation of all previous permits and licenses given or granted.

III.

That no reservation of any title or right was made in or by said patent and that no implied reservation did arise, or was made and that none exists and that any such reservation is inconsistent with the terms of the grant contained in defendant's said patent.

Wherefore, defendant prays that plaintiff's pretended action be dismissed and its complaint be held for naught and that
 52 defendant be awarded his costs herein. J. F. Ailshie, Wm. H. Bonneville, Attorneys for Defendant, P. O. Address, Coeur d'Alene, Idaho.

[File endorsement omitted.]

In United States District Court.

(Title of Court and Cause.)

Memorandum Decision upon Motion to Dismiss.

[Filed Sept. 18, 1920.]

John P. Gray and W. F. McNaughton, Attorneys for Plaintiff.
 J. F. Ailshie, Attorney for Defendant.

DIETRICH, *District Judge*:

Admittedly the motion to dismiss in this case involves precisely the same question that was disposed of in *Washington Water Power Company v. Harbaugh*, 253 Fed. 681, but in view of the earnestness with which counsel for the defendant has represented it, I have given it additional consideration. While, as originally suggested, the question is not entirely free from doubt, I am not convinced that the
 53 conclusion reached is erroneous. It is true that the patent upon its face purports to be absolute, but as pointed out in the *Harbaugh* case, at the time it was issued there was in force the following express general regulation: "The final disposal by the United States of any tract traversed by a right of way permitted under the said act shall not be construed to be a revocation of such

permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act." I am inclined to think that the defendant took his patent subject to the reservation thus provided for, and that in effect his status is the same as it would have been had the language of the regulation been written into the patent. There cannot, at this stage at least, be any contention that the defendant was ignorant of the plaintiff's interest, for it was in open possession of the right of way and was using the same; and it must be assumed that the defendant knew of the regulation. What view should be taken in a case where the patent issued prior to the promulgation of the regulation need not be discussed.

Accordingly, the motion will be denied, and a like order will be entered in each of the cases numbered 752, 753 and 755.

[File endorsement omitted.]

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In United States District Court.

(Title of Court and Cause.)

Statement of Case.

[Filed July 26, 1921.]

Be it remembered that on the 23rd day of May, 1921, the case of Washington Water Power Company, a Corporation, vs. John Swendig, No. 752; the case of Washington Water Power Company, a corporation, vs. James W. Miller, No. 753; the case of Washington Water Power Company, a Corporation, vs. Remigus Grab, No. 754, and the case of Washington Water Power Company, a Corporation, vs. Anthony Kerr, No. 755, and each of them came on for trial before the Court without a jury at Cœur d'Alene, Idaho. John Gray appearing for plaintiff and J. F. Ailshie and Ray Agee appearing for each of the defendants.

It appeared that the same question was involved in each of said cases, and upon stipulation of attorneys, in open Court, the cases were consolidated by order of the Court for trial upon both law and the facts for all purposes in this and all Courts, and for all purposes as entitled above, and thereupon the following evidence was introduced, and the following proceedings had, as hereinafter set out in this statement of the case, to-wit:

FRANK LANGLEY, a witness called and sworn on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Gray:

55 I am Register of the Government Land Office in this city. I have under my charge the plats of townships in this land

district. I have with me plats of townships 42-7 and 47-3 West. These plats are official records of our office. Said plats were thereupon offered in evidence by Mr. Gray as Plaintiff's Exhibits No. 1 and 2 and leave asked to substitute certified copies.

Mr. Ailshie: I object to this as incompetent and immaterial, and not only that, but it tends to incumber the record, and it covers matters that are not in issue here. It only affects the lands of one quarter section of land involved here, and there is no issue as to the power line running across the lands that we have taken patents for.

Mr. Langley: These plats are now in the condition in which they were when they were first filed in our office in so far as showing the power line across the plats. The electric power line shown on the two plats was there when it was filed in our office. This is not the original plat that was filed. It is a certified copy. The original was destroyed by Fire in October, 1911, and the tract books in the office show the date of filing of the original plats. For township 47-2 West, the filing date is May 2, 1910. For 47-3 West, it is May 2, 1910. These plats are copies, certified to by the Recorder of the General Land Office, filed to replace the old original plats that were burned in the fire.

Offered in evidence.

Objection overruled; Plaintiff's exhibits 1 and 2 admitted.

56 Thereupon the Court granted exceptions to both parties to all adverse rulings, including the foregoing ruling.

Mr. Langley: This is the copy of a circular with respect to entries of lands in the Cœur d'Alene Indian reservation, issued by Mr. Witten, with respect to entries being subject to railroad rights of way and power transmission lines. I did not look for the original. It came with a letter from the Commissioner of the General Land Office.

Q. Are you able to tell the date that circular was originally issued?

Objected to as not the best evidence of the date when issued.

Objection overruled.

A. I am not able to tell the date. I might be able to find the date. I haven't looked for it. I have such circular with reference to the Cœur d'Alene Indian Lands in my files. The one I have found is attached as an exhibit to a letter from the Commissioner of the General Land Office, dated July 8, 1921, I do not know whether or not one of these was received at any previous time.

Q. Is the certified copy which I have here a copy of the letter which you have in your files?

Objected to as not the way to prove copies.

Sustained.

Mr. Gray: Well, I will offer that in evidence and in lieu of it I will offer a certified copy.

57 Objected to as incompetent to prove any facts in issue, and on the ground that it was not issued by the Secretary of

the Interior or the Commissioner of the General Land Office, and hasn't the force or effect of an executive order or an order of the Department, and upon the further ground that this circular provides that, "All lands for which rights of way have been obtained for railroads or power transmission lines must be entered subject to such rights of way," and the permit for power transmission is only a license and not an easement.

Received subject to the objection which was to be considered later.

Cross-examination.

By Mr. Ailshie.

I have no memory of the original plat of which this is a certified copy. I couldn't identify or remember any particular line or thing that is on this copy. I cannot say of my own knowledge whether or not these lines indicating a power line were on there when the original plat was filed in our office.

Thereupon a certain plat was marked Plaintiff's Exhibit No. 4.

Mr. Gray: I desire to offer in evidence a map, the original easement and grant from the Secretary of the Interior to the Washington Water Power Company, for a telephone line across the Coeur d'Alene Indian reservation, marked for identification as Plaintiff's Exhibit No. 4.

58 Objected to as not identified or proven to be a plat or map issued, or permit granted by the Department.

Overruled; Plaintiff's Exhibit No. 4 admitted.

Thereupon certain papers were marked Plaintiff's Exhibits Nos. 5, 6, 7, 8, 9, and 10.

Mr. Gray: I desire to offer in evidence a file of correspondence marked Exhibits 5 to 9, inclusive, and Plaintiff's Exhibit No. 10, the voucher for \$224.00 of the Washington Water Power Company, received by E. A. Hitchcock, Secretary of the Interior, showing the appraisal of damages for that right of way, and the payment to the Government of the United States.

Mr. Ailshie: I object to each of the offered exhibits not because it is not shown that they are what they purport to be, but because they are incompetent to prove any issue in the case and not the best evidence.

Overruled; Plaintiff's Exhibits 5 to 10 inclusive, admitted.

Thereupon a certain paper was marked Plaintiff's Exhibit No. 11.

Mr. Gray: I desire to offer the permit, a certified copy of the permit for a power transmission line over the Coeur d'Alene Indian Reservation.

The Court: I don't know that this correspondence is identified with this particular right of way, gentlemen.

59 Mr. Gray: I will do that later, if Your Honor please. This is a certified copy of the original.

EUGENE LOGAN, a witness produced and sworn on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Gray:

I am a civil engineer residing in Spokane. I was educated at Washington State College. I have been engaged in the practice about thirteen or fourteen years. At present I am engineer for the Washington Water Power Company. I have been with the company about thirteen years. I am familiar with the telephone line and the power transmission line in question here. This is the only line across the Coeur d'Alene Indian reservation. Both lines are on one line of poles. I have seen Plaintiff's Exhibit 4 and also Exhibit 11. I have surveyed that line out since. The lands were subdivided into townships and sections and other legal subdivisions. I have a map showing the line as it crosses the lands of the defendants. I have surveyed it across the lands of each defendant. It is the same line that is shown upon Exhibits 4 and 11, and in the same place. I made the survey in 1909. The Company has never had any other telephone line or power transmission line, across the Coeur d'Alene Indian Reservation and these lines have been located in the same position ever since I have been with the company. I
60 have maps showing the line as it crosses the individual lands of the defendants. These two maps show the line across the lands of the four defendants.

Plaintiff's Exhibits Nos. 12 and 13 were then offered in evidence.

Objected to on the same grounds as other objections to exhibits. Overruled, and Plaintiff's Exhibits 12 and 13 were admitted.

Cross-examination.

By Mr. Ailshie:

I made the last survey in 1909. I was through there last fall. I haven't made any survey since that time. The telephone wires and transmission wires are on the same poles. The current carried over that line is approximately sixty thousand volts. These poles are principally thirty-five foot poles, with a seven-inch top. There is one transmission wire that is on an insulator which sets on top of the pole. It is a three-wire transmission. The other two are on a single cross arm. The telephone wire is on another cross arm either seven or nine feet below the transmission wire. I do not know which was constructed first, the transmission line or the telephone line. They were on there the first time I was there. They would not be likely to put in poles of that size if it was constructed for a tele-

phone line in the first place. Those are not standard telephone poles.

61 Redirect examination.

By Mr. Gray:

I couldn't see any difference in the position of the line last fall and when I made my survey.

JOHN B. FISKIEN, a witness produced and sworn on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Gray:

I am an electrical engineer residing in Spokane. I was educated at the Government College in Glasgow, Scotland, and I have followed it since 1886—35 years. I had charge of the construction of the Washington Water Power Company's lines from about 1904 until three years ago. I had charge of the maintenance and operation of all the transmission lines up to about three years ago. I have been with the Washington Water Power Company since 1887. The first power line was finished in the Coeur d'Alenes in the summer of 1903. I am familiar with the manner of construction of this line. It is necessary to watch the condition of the line, to anticipate repairs and renewals, and make repairs at the time of the patrol, if it can be done, and generally to see that the line is in shape to give service. We have to watch for the condition of the insulators, to note whether they are cracked or not, whether any of the tie wires, which tie the conductors to the insulators, are coming off or not, to note the condition of the insulators on the telephone line and also the tie wires, to see that there is no liability of the telephone line or the transmission lines getting tangled up; to note the condition of the poles from the ground up, and on occasion to make tests of the poles below the ground line; to note the condition of the surroundings of the poles, from fire risk standpoint; also from the standpoint of safety in case of washouts.

62 Q. Mr. Fiskien, does that line serve any important use? If so, what?

Objected to as immaterial and incompetent.

Overruled.

It serves the Coeur d'Alene Mining District, the mines, mills, smelters, and dredges, besides the distribution systems in Kellogg and Wardner, Osborne and Wallace. That line was always patrolled while I was in charge. It was usually patrolled by a man on horseback, and sometimes on snowshoes. This practice continued from 1903. The patrolmen were located along the line at intervals, depending upon the difficulties of getting along the patrol road. They always carried a telephone and their body tools, some small

insulators and a little wire. At times they would have more than that, but that was the regular equipment. A patrolman could make any repairs on the telephone line at any time, and he could repair poles. He could not handle the high tension transmission wires. Service had to be interrupted to do it. There was a patrol road established

63 when the line was built. It was close to the poles wherever it could be. There were a few places where it was impossible to put a patrol road right along the line. It is necessary to have a patrol road along a transmission line, with the right to freely go along it. It is necessary to use a road or right of way for the repair of the lines, it is necessary to enable repair materials to be hauled in. It is necessary to repair poles occasionally. The average life of a pole is about 15 years. A patrolman should pass not more than fifty to seventy-five feet from the line. The right of way should be a minimum of fifty feet on each side of the line. It is necessary in timbered country to enable men to get in there in case of fire in the adjacent timber. It is necessary for replacing either permanent or temporary guys, and for raising poles.

Cross-examination.

By Mr. Ailshie:

I don't know whether or not there has even been any road through any of the places owned by these defendants. I did not patrol the line at that point. All I know is that I have employed men up there for that purpose. I do not know where these premises are. We would need fifty feet on each side of the line through a man's field. It is necessary for guys and handling the poles. I don't know whether or not we have used it in this particular location. A great many of the poles in this location have been stubbed. Some have been replaced.

64 LEROY HOOPER, a witness produced and sworn on behalf of the plaintiff, testified as follows:

Examination.

By Mr. Gray:

I am a patrol man for the Washington Water Power Company, residing at Medimont, Idaho. I patrol from Rose Lake on the East to the St. Joe River on the West. I patrol the complete line once a week when weather conditions permit. I make repairs both permanent and temporary. I haven't replaced any poles since I have been on the job, but I have stubbed some of them. I have been working there since the 19th day of September, 1920. I have stub-poles which have broken off and partially fallen over. I patrol for anything unusual along the line, either growth of trees, or broken insulators, wires, or poles leaning over. I observe the conditions of the poles as I go along. I should pass within not more

than one hundred feet from the poles. I have not been able to travel along there on my horse or wagon that close to the lines. In places there are solid fences, and no gates. I follow the road. The only way I can follow the pole line is on foot. It is necessary to go along the pole line to replace a pole, with a team, at least one horse.

Cross-examination.

By Mr. Ailshie:

I have been acquainted with the patrol line through the
65 places of the defendants since last September. I was over the line with a previous patrol man a number of times before that. I do not know whether or not there has ever been a patrol road along the line through there or not. My recollection is that in patrolling with my brother, about nine years ago, we followed the pole line with a buggy. I couldn't say who owns the land over which we crossed. We patrolled with a buggy, and followed the pole line. I was not familiar, at that time, with who owned the lands. We could go practically the whole line. The country is rolling through there. It is not passable with the buggy at the present time. I was speaking of nine years ago. The road in some places at the present time is a quarter of a mile from the pole line. We go in there on nfoot. It has not always been the same.

The first time I saw it, about nine or ten years ago, we practically followed the pole line from the top of the hill above Medimont to the brow of the hill overlooking the St. Joe River near Chatcolette, South of Harrison.

Redirect examination.

By Mr. Gray:

The road East of Mr. Swendig's place follows or crosses the power line. I follow that road past his place, the road passes to the North, and I follow the road until I come to Mr. Miller's land, when I enter his land, which I think is at the corner, and then I
66 come back to the power line and after winding back of Miller's house and barn, I get to the power line. I follow the pu' lie road. It takes me in places half a mile from the line; the timber is so thick that I can't see the line in places for four or five miles at a stretch. If I want to go over the line I have to get out and walk over to it. The ground along the pole line across Swendig's place was plowed up when I went through in April.

Recross-examination.

By Mr. Ailshie:

When I spoke of four or five miles through timber, I did not refer to Swendig's place. It was three or four miles East of his place, over toward Kellogg.

Redirect examination.

By Mr. Gray:

The power line runs diagonally across Swendig's place, and when the power line crosses the road of course I am at the line, and then I go straight ahead along the road which I think is a section line and I will be a quarter of a mile from it at the greatest distance. I don't know Kerr's land and Grab's land by the description from the map, but I know where it lies in reference to the power line. The public road is about half a mile to a mile from the power line as it crosses Kerr's place.

67 ALBERT H. BECKWITH, a witness produced and sworn on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Gray:

I am an electrical engineer, residing at Spokane, Washington. I was educated at McGill University, Montreal, and have been practicing since May, 1906. I am assistant to the Superintendent of Light and Power with the Washington Water Power Company. I am familiar with the line of the Company which extends across what was formerly the Cœur d'Alene Indian reservation, also across the lands of the defendants. I was over that line about a week ago. I have been assistant on the maintenance work since 1918. We have maintained a patrol along that line all the time. It is necessary to patrol this line because the poles are now getting to an age that they are deteriorating very rapidly, and we have to stub them. We have to observe broken insulators, broken wires, and keep our telephone line operating properly, to keep in communication with the Cœur d'Alene Mining District. A patrolman should pass immediately along the line. A patrol road is necessary to enable us to drive along the line, because we have to haul subs and wire and hardware for making necessary repairs, or if poles burn down, we have to haul poles in on the line to replace the ones burned
68 down. Sometimes the entire poles have to be taken in, in place of stubs. The right of way should be one hundred feet wide. So that in case a pole falls over it may be replaced by a new one, you would have to use that much ground, fifty feet on the side of the line, at least, to get another pole up into place again and get that one out of the way. Here and there we have to put temporary guys on, and they have to be set back from the line far enough so that they will hold the pole in position. The contour of the country is not always such that we can run right along at the foot of the poles.

E. S. CRANE, a witness produced and sworn on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Gray:

I reside at Cœur d'Alene, and am right of way agent for the Washington Water Power Company. I have been working for the company for sixteen years. The Company did not build any other telephone line or power line across the reservation other than the high power line. It was built in 1902 and 1903. I know the lands of the four defendants. There was a patrol road built all the way along that line, and it was the only road that was built into that county to that day, up to 1910. It was the only road. It crossed the lands of the defendants before they filed on them. I was over their lands last year. Some of it was plowed up.
69 The patrol road is fenced off. I went around a different road, the County road, I think it is. The power line is at the same place as it originally was. The right of way for this telephone and power line across the reservation was appraised by Major Anderson. He was Indian Agent, I think his headquarters were at Spokane, but he had charge of the Cœur d'Alene Indian Reservation.

Mr. Gray: I desire to offer a certified copy of the letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated August 23, 1912.

Objected to on the ground that it is incompetent to prove any easement or franchise or other right in the real estate in question.

Overruled; Plaintiff's Exhibit 14 admitted.

J. W. MILLER, a witness produced and sworn on behalf of defendants, testified as follows:

Direct examination.

By Mr. Ailshie:

I am one of the defendants. I made entry upon the tract of land described in the complaint served on me; also final proof. Defendants' Exhibit No. 1 is the patent that was issued to me for this land.

Defendants' Exhibit No. 1 admitted in evidence and copy thereof contained in answer substituted for original patent.

70 I have been the owner of this land ever since I received my patent for it. I am still the owner and have been in possession of it during all that time.

Cross-examination.

By Mr. Gray:

This power line across my land was there when I first settled on the land. I knew it when I made my first entry. It is in the same place as it was at that time.

JOHN SWENDIG, a witness produced and sworn on behalf of defendants, testified as follows:

Direct examination.

By Mr. Ailshie:

I reside on a farm at Harrison, and I am one of the defendants. I filed and made final proof on the land described in the complaint against me. I also received patent for it. Defendants' Exhibit No. 2 admitted in evidence and the copy thereof contained in the answer substituted for the original patent.

I have owned this land ever since I received patent for it, and am still the owner. I have been in possession of it all the time since I first entered it. There has not been exactly a road along the pole line. It was passable at all times. I don't know that I ever remember of a road being there.

71 Cross-examination.

By Mr. Gray:

When I first settled here, this pole line, power transmission line and telephone line were constructed across the land. I don't know whether or not it was there when I made my entry. I was not sure of my lines. The power line was there at that time. I don't remember whether or not the line was shown on the plat in the land office or not. I examined the plat. I don't remember about the power line. I did not consider it at that time. It was there before I settled.

REMIGUS GRAB, a witness produced and sworn on behalf of the defendants, testified as follows:

Direct examination.

By Mr. Ailshie:

I live at Harrison on a farm. I am one of the defendants. I made entry on the lands described in the complaint served on me. I made final proof on the same. Defendants' Exhibit No. 3 is the patent that was issued to me for this land.

Defendants' Exhibit No. 3 was thereupon admitted in evidence and the copy thereof included in the answer substituted for the original patent.

I have owned that land ever since I received the patent and am still the owner. I have been in possession of it all that time.

72 Cross-examination.

By Mr. Gray:

When I settled on the land the power line of the Washington Water Power Company ran across it. I didn't know it at first but I saw it was there when I filed on it. It has been there ever since.

Redirect examination.

By Mr. Ailshie:

I filed on it here at Coeur d'Alene. I asked them about the power line, and they told me I couldn't fence it up so long as the government owned it. They told me that when I had a patent for it then I could do as I pleased with it. No one would have any rights to it.

Recross-examination.

By Mr. Gray:

The people in the land office told me that. I don't know who the officer was. And I asked them about the road and about getting through the place, and they said I couldn't fence it up so long as it belonged to the Government, yet, and when I get a patent it is my own, and I am the boss myself on it. Mr. Whitney made that statement, a couple of them there made it.

Mr. Gray: I move to strike that out if Your Honor please.

Motion sustained.

73 ANTHONY KERR, a witness produced and sworn on behalf of defendants, testified as follows:

Direct examination.

By Mr. Ailshie:

I reside at Harrison, Idaho, on a farm. I am one of the defendants. I filed upon the tract of land described in the complaint which was served on me in this action, and made final proof upon it. I received a patent for the land. It is the document marked Defendants' Exhibit No. 4. I have owned that land ever since, and am still the owner of it, and have been in possession of it ever since that time.

Thereupon Defendants' Exhibit No. 4 was admitted in evidence and the copy thereof contained in the answer ~~substituted~~ for the original patent.

Cross-examination.

By Mr. Gray:

The power line and telephone line had been constructed across that land when I first saw it. I knew it before I filed on the land. It has been there ever since.

Mr. Ailshie: I now offer in evidence a certified copy of the order and decision of the Secretary of the Interior, of date April 23, 1921, construing and passing upon the effect of the order of August 24th that has just been introduced by plaintiff.

74 Objected to on ground that it doesn't construe the order of August 24th.

Overruled; and Defendants' Exhibit No. 5 admitted in evidence, which is a copy of the certified copy of said order and decision, dated April 23, 1921.

And be it further remembered that the foregoing comprises all the evidence that was introduced or considered upon the trial of said consolidated causes.

And now come the defendants and submit the foregoing draft of statement of case and exceptions and pray an order settling the same.

Dated this 24th day of June, 1921. J. F. Ailshie and Ray Agee, Residing at Coeur d'Alene, Idaho, Attorneys for Defendants.

Order Settling Statement of Case.

Settled, allowed and ordered filed as Statement of Case and Exceptions this 26th day of July, 1921. Frank S. Dietrich, District Judge.

Lodged June 24, 1921. W. D. McReynolds, Clerk, by L. M. Larson, Deputy.

[File endorsement omitted.]

75

In United States District Court.

(Title of Court and Cause.)

Decree.

[Filed May 26, 1921.]

The above causes came on to be heard before the Court at Coeur d'Alene, Idaho, on the 23rd day of May, 1921.

It appeared that the same question was involved in each of said

cases, and the attorneys for the parties stipulating thereto and the Court believing that it was proper that said causes be consolidated, it was ordered that the said four cases be consolidated and tried as one case.

Thereupon the Court heard the evidence adduced by the parties and the argument of counsel, and the case having been submitted for the decision of the Court, and the Court having heretofore made its decision herein, and now being well advised in the premises, upon consideration thereof,

It is ordered, adjudged and decreed as follows:

(1) That the permit granted and given by the Secretary of the Interior of the United States to the plaintiff, The Washington Water Power Company, in pursuance of the provisions of the Act of Congress of February 15, 1901 (31 Stat. at Large, 790) and dated July 7, 1902, for a right of way across and permission to construct and maintain an electric power transmission line over and across the Coeur d'Alene Indian Reservation, and over and across, together with other lands, the

76 Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2, W. B. M. is a valid and subsisting permit and in full force and effect, and the plaintiff, The Washington Water Power Company, is in possession of said right of way and of said power transmission line constructed over and along said right of way and is the owner of said permit and power line.

(2) That the plaintiff, The Washington Water Power Company, is the owner of a right of way easement for a telephone line upon and across, together with other lands, the said

Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township N. R. 2, W. B. M. which easement for right of way was acquired by the plaintiff under the provisions of Section 3 of an Act of Congress approved March 3rd, 1901, entitled "An Act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations

77 with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes," which said right of way easement was granted by the Secretary of the Interior of the United States under date of April 15, 1902, and which said right of way is identical with the said right of way for the elec-

tric power transmission line, referred to in paragraph 1 of this decree, and said telephone as now constructed is incidental to the use of the said power transmission line, and the said right of way easement so granted is now in full force and effect and is a valid and subsisting easement for right of way.

(3) That the plaintiff is entitled to maintain along said power transmission line and telephone line a roadway, which said roadway must be within fifty feet of the center of said line as the same is now constructed over and across the lands described as follows:

Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2, W. B. M. and the agents, servants and employes of the plaintiff are entitled to go along said power transmission line at all times and to keep and maintain said roadway for such purpose.

78 (4) Plaintiff is further entitled, in making repairs or renewals, to the use of such land within fifty feet of the center of said line as may be necessary for renewals.

(5) That the title of the defendant, John Swendig to the land described as the Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M., is subject to the foregoing rights of the plaintiff.

That the title of the defendant, James W. Miller, to the land described as the North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M., is subject to the foregoing rights of the plaintiff.

That the title of the defendant, Remigus Grab, to the land described as the Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M., is subject to the foregoing rights of the plaintiff.

That the title of the defendant, Anthony Kerr, to the land described as Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2 W. B. M., is subject to the foregoing rights of the plaintiff.

It is further ordered, adjudged and decreed that if any one of the defendants maintains any fence or fences on, around or across said lands, he must provide gates therein for the plaintiff's use of sufficient width for the passage of ordinary vehicles at the places
79 where said roadway passes through any such fence, and the plaintiff shall furnish locks and keep said gates locked.

It is further ordered, adjudged and decreed that the said defendants and each of them, and all persons acting under the authority of any of them, or pretending so to act, and all successors in interest of said defendants and of each of them, be and they hereby are perpetually enjoined and restrained from interfering with the plaintiff in the operation and maintenance of the said electric power line and said telephone line and said patrol road over and across the said lands described as follows:

The Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southeast quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2 W. B. M.,

and from interfering with the agents, employes and officers of said plaintiff in patrolling and inspecting the said line and going along said roadway at any and all times, and from in any manner interfering with the plaintiff in making repairs or renewals thereof or in conveying materials therefor along said road.

80 It is further ordered, adjudged and decreed that the rights of the plaintiff shall be limited to a strip of land fifty feet on each side of said electric power transmission line as the same is now located upon the ground, and that subject to the plaintiff's reasonable needs for the uses herein defined, the defendants shall have the right to occupy and utilize said strip of land, and the plaintiff and its employes in going along said road must use reasonable care to do no more injury to the defendants' growing crops than may be reasonably necessary, and must keep within fifty feet of the center line and in a roadway on one side or the other thereof, except as may be necessary in passing from the road to the poles or line. In making repairs or renewals reasonable care shall be exercised not to do unnecessary damage to crops growing along and near the line.

It is further ordered, adjudged and decreed that the plaintiff do have and recover its costs herein taxed as follows:

Against the defendant, John Swendig.....	\$53.29
Against the defendant, Remigus Grab.....	\$40.69
Against the defendant, Anthony Kerr.....	\$40.69
Against the defendant, James W. Miller.....	\$40.69

Dated this 26th day of May, 1921. F. S. Dietrich, Judge.

[File endorsement omitted.]

80½ United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

81 At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Tuesday, the fourteenth day of February, in the year of our Lord one thousand nine hundred and twenty-two.

Present: Honorable Erskine M. Ross, Circuit Judge, Presiding; Honorable William W. Morrow, Circuit Judge; Honorable William H. Hunt, Circuit Judge.

No. 3769.

[Title omitted.]

Order of Submission.

Ordered appeal in the above entitled cause argued by Mr. James F. Ailshie, counsel for the appellants, and by Mr. John P. Gray, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel for the appellee to file a reply brief within twenty (20) days from date, counsel for appellant to file an additional memorandum.

82 At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Monday, the third day of July, in the year of our Lord one thousand nine hundred and twenty-two.

Present: Honorable William W. Morrow, Circuit Judge, presiding; Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

Order Filing Opinion, etc.

By direction of the Honorable Erskine M. Ross, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a Decree or Judgment be filed and recorded in the Minutes of this Court in each of the said causes in accordance with the opinion filed therein:

83 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3769.

[Title omitted.]

Upon Appeal from the United States District Court of the District of Idaho, Northern Division.

Before Ross, Morrow, and Hunt, Circuit Judges.

Opinion, Ross, J.

[Filed July 3, 1922.]

The appellant, a corporation engaged in the generation and distribution of electricity in the states of Idaho and Washington, filed, prior to July 7, 1902, an application with the Department of the Interior for a permit for a right of way across, and for permission to construct and maintain, an electric power transmission line over and across the Coeur d'Alene Indian Reservation. The application was made in pursuance of the provisions of the Act of Congress of March 15, 1901 (31 St. Lg. 790), which act is as follows:

84 "That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: Provided, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: Provided further, That all permits given hereunder

for telegraph and telephone purposes shall be subject to the provision of Title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: And provided further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor

85 in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

The permission so applied for was given by the Secretary of the Interior prior to July 7, 1902—the lands over which the right was given being a part of the Coeur d'Alene Indian Reservation, and then being unsurveyed and not open to settlement. Pursuant to the permission so given, the appellee constructed over and across the Reservation a high tension electric power transmission line extending from Spokane, Washington, to Boise, Idaho, in the Coeur d'Alene Mining District, which line has ever since August, 1903, been used for the purpose of supplying electric power and energy to that mining district. At about the same time the appellee filed a similar application with the Department of the Interior for permission to construct a telephone line over and across the Indian reservation mentioned, under and pursuant to Section 3 of the Act of Congress approved March 3, 1901, entitled "An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes." Under that application the Secretary of the Interior granted the appellee the right to survey, locate, and maintain the telephone line desired, upon the payment of the damages and compensation assessed under his direction, amounting to \$224.00, which sum was paid by the appellee into the office of the Commissioner of Indian Affairs. The telephone line was constructed upon the same poles as the electric power transmission line, and is used in connection with and as incidental to the power transmission line. For the purpose of construction and maintaining the lines mentioned, a patrol road was built by the appellee during the years 1902 and 1903, along which its patrolmen pass in patrolling the lines and in keeping the same in repair and available for use. Subsequently and in the year 1906, an act of Congress was passed making provision for the allotment of lands to members of the Coeur D'Alene tribe of Indians within the

86 reservation, and the subsequent opening of the reservation to settlement. Later, and in the year 1910, the appellants made homestead filings upon their respective tracts of land within the reservation over and across which the power and telephone lines had been constructed, and they subsequently made entry and received patents for their said respective tracts of land. Thereafter the appellants denied any right on the part of the appellee to operate or maintain either of the said lines, and interfered with the exercise of those claims of right. Four several actions were brought

by the appellee against the appellants, seeking injunctions restraining them from interfering with the asserted rights, and to establish by decree that the permits granted continued in full force and effect. At the trial the four cases were consolidated and the issues practically reduced to one, which one was and is whether the patents issued to the appellants revoked and cancelled the permits theretofore granted by the Secretary of the Interior to the appellee. The facts were not disputed and each of the appellants admitted that the appellee's plant had been constructed and was in use at the time he first settled upon the land claimed by him.

Ross, *Circuit Judge*, after stating the case:

Not only did the appellants at the time that they settled upon their respective tracts of land have actual notice of the existence and operation of the appellee's transmission and telephone lines and incidental patrol road, but they are properly chargeable with actual knowledge of the law under and by authority of which those lines were constructed and were being operated, and of the right of the appellee to continue to operate them until the permission to do so should be revoked by the Secretary of the Interior; for the statute, as will be seen, in terms so declares. It expressly provides that the power conferred upon the Secretary should be exercised "under general regulations to be fixed by him," of which latter the appellants must be held to have had notice. And the statute

itself declares that any permission given by the secretary
87 under the provisions of the act "may be revoked by him or his successor in his discretion, and shall not be held to confer any right or easement or interest in, to, or over any public land, reservation, or park."

The question, therefore, we have to decide, is whether the permits under which the appellee constructed and for years maintained its costly plant, were legally terminated by the issuance of the government's patents to the appellants.

It is conceded—or seems to be conceded, by counsel for the appellants, that had the patents in terms excepted the permits that had been theretofore granted by the Secretary of the Interior in pursuance of the act of Congress that has been referred to, the previously existing rights of the appellee would not have been affected.

The government could not grant, by patent or otherwise, what it did not own, nor anything more than it owned. It owned the fee of the lands upon and over which the appellee's plant was constructed and was being operated subject to the terms and conditions expressly declared in the statute and the regulations of the Interior Department under and pursuant to which such plant was constructed and was being operated, of which record evidence all parties, including the appellants, settlers, and patentees, had full notice. The permission granted to the appellee was subject to revocation at any time by the then Secretary of the Interior or his successor; but that was the sole condition to the continuous existence of the rights

of way granted, and that reserved power on the part of the grantor was never exercised prior to the issuance of the patents to the appellants, nor since, so far as appears. Whether the rights of way could be revoked by the present or any other successor of the then Secretary is not for consideration in the present case.

We see no force in the connection of the counsel for the appellants that the grants of rights of way to the appellee were mere licenses. The *Espediente* which formed the basis of the claim

88 in *De Haro v. United States*, 5 Wall. 599, was, as held by the

Supreme Court, (pp. 622 et seq.,) nothing more, nor was it intended to be anything more, than a permit to pasture certain land temporarily until the ejidos were measured—in other words, a mere permissive temporary occupation of land for grazing purposes, which the Supreme Court said in its opinion (p. 627) “the Governor was willing should be in writing instead of by parol, to enable the licensees to enjoy their possession with greater security. And this leads us to a consideration of the law on the subject of licenses.” The court then proceeded to declare the law, saying:

“There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no sense is it property descendible to heirs. These are familiar and well-established principles of law, hardly requiring a citation of authorities for their vindication; but if they are needed, they will be found collected in the notes to 2d Hare & Wallace’s *American Leading Cases*, commencing on page 376. We are not aware of any difference between the civil and common law on this subject.”

It would hardly be contended that the appellee could not have at any time transferred or conveyed its power and telephone lines, with all incidental rights pertaining thereto to some other

89 company or person, or that its rights in the premises would not have passed to its creditors in the event it had been unsuccessful in its business.

We see no merit in the appeal, and, accordingly, the decree is Affirmed.

[File endorsement omitted.]

90 United States Circuit Court of Appeals for the Ninth Circuit.
No. 3769.

Decree.

[Filed July 3, 1922.]

Appeal from the District Court of the United States for the District of Idaho, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Northern Division and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellants.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellants for its costs herein expended, and have execution therefor.

[File endorsement omitted.]

91 At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Monday, the seventh day of August, in the year of our Lord one thousand nine hundred and twenty-two.

Present: Honorable William W. Morrow, Circuit Judge, Presiding; Honorable William H. Hunt, Circuit Judge.

No. 3769.

[Title omitted.]

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Honorable Erskine M. Ross, William W. Morrow and William H. Hunt, Circuit Judges, before whom the case was heard, it is ordered that the Petition, filed July 31, 1922, on behalf of the appellants, for a rehearing of the above-entitled case be, and hereby is denied.

92 United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Petition for Appeal.

[Filed Sept. 29, 1922.]

To the Honorable William B. Gilbert, Circuit Judge, a judge of the United States Circuit Court of Appeals for the Ninth Circuit:

The above named defendants and appellants, and each of them, feeling aggrieved by the decree made, rendered and entered in the above entitled consolidated causes, which decree was made and entered on the 14th day of August, 1922, upon the opinion of the above entitled court made and filed on the 3rd day of July, 1922, affirming a decree of the District Court of the United States for the District of Idaho, Northern Division, against these appellants and in favor of appellee and which said decree of the District Court was made on the 26th day of May, 1921, do hereby appeal from said decree of the above entitled court to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law and that a transcript of the records, proceedings and documents, upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United

93 States sitting at Washington in the District of Columbia under and in accordance with the rules of such court in such cases made and provided. And your petitioners further pray that the proper order relating to the required security to be required of them be made. James F. Ailshie, Attorney for Appellants, Residence and Post Office address, Cœur d'Alene, Idaho.

[File endorsement omitted.]

94 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3769.

[Title omitted.]

Assignment of Errors.

[Filed Sept. 29, 1922.]

Now come the appellants in the above entitled cause and file the assignment of errors upon which they rely upon their prosecution of the appeal in the above entitled cause from the decree of the above entitled Court made and entered on the 14th day of August, 1922, upon the opinion of the said Court made and filed on the 3rd day of July, 1922, affirming a decree of the District Court of the United States for the District of Idaho, Northern Division, against these

appellants and in favor of appellee and which said decree of the District Court was made on the 26th day of May, 1921, and which said assignment of errors is as follows:

I.

That the court erred in affirming the judgment of the District Court and in holding that the complaint herein states causes of action respectively against the appellants.

II.

That the Court erred in holding and decreeing that the permit granted to appellee for a right of way across the lands of appellants, and each of them, for the construction and maintenance of an electric transmission line is a valid and subsisting permit in force and effect since the issuance of patent to appellants.

III.

That the Court erred in holding and decreeing that appellee is the owner of a right of way and easement for a telephone line upon and across the respective lands of these appellants.

IV.

That the Court erred in holding and decreeing that appellee is entitled to maintain a roadway along the power transmission line described in said decree.

V.

That the Court erred in holding and decreeing that appellee is entitled to the use of land within fifty feet of the center of said power line in making repairs and renewals.

VI.

That the Court erred in holding and decreeing that the title of these appellants, and each of them to the lands described in their patents and the decree herein is subject and subservient to any rights of appellee to maintain a power transmission line across the same.

VII.

That the Court erred in holding and decreeing that the permit granted to appellee under the provisions of the Act of Congress of Feb. 15th, 1901 (31 Stat. Lg. 790) was not revoked by the subsequent issuance of unqualified patents to these appellants.

VIII.

96 That the Court erred in holding and decreeing that the title taken by appellants under their patent from the Government was subject to and impressed with a superior right, easement or license granted to appellee by the Secretary of the Interior, prior to the entry of the said lands by appellants and which said permit was granted under the provisions of the Act of Feb. 15, 1901 (31 Stat. Lg. 790).

IX.

The Court erred in not holding that the permit granted to appellee under the Act of Feb. 15, 1901, (31 Stat. Lg. 790) was a mere license revokable at will and that the same was revoked ipso facto by the issuance of patents to homesteaders thereon, and the Court erred in not holding in conformity with the express terms of said Act of Feb. 15, 1901 (31 Stat. Lg. 790) that such permit "shall not be held to confer any right, or easement, or interest in, to or over any public land, reservation or park."

X.

The Court erred in not holding and decreeing that Paragraph 11 of the regulations of the Land Department (31 L. D. 17) which was in force at the time that appellants entered the lands subsequently patented to them was a part of the law in force at the time, and notice to them of the construction the Land Department then placed upon the provisions of the Act of Feb. 15, 1901 (31 Stat. Lg. 790) to the effect that

"The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it effects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department".

XI.

97 The Court erred upon the whole record in holding and decreeing that appellants were not entitled to the relief asked for decreeing their respective lands free and clear of any right or easement in favor of appellee. James F. Ailshie, Attorney for Appellants, Residence and P. O. Address, Coeur d'Alene, Idaho.

[File endorsement omitted.]

98 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3769.

[Title omitted.]

Order Allowing Appeal.

[Filed Sept. 29, 1922.]

On motion of James F. Ailshie, attorney and counsel for appellants, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein be and the same is hereby allowed and that a certified transcript of the records, documents and all proceedings upon which said decree was based be duly authenticated and forthwith transmitted to the said Supreme Court of the United States.

It is further ordered that the bond on appeal required by law be fixed at the sum of Three Hundred (\$300.00) Dollars.

Dated this 27th day of September, 1922. Wm. B. Gilbert, Circuit Judge.

[File endorsement omitted.]

99 United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Bond on Appeal.

[Filed Sept. 29, 1922.]

Know all men by these presents, that we, John Swendig, James W. Miller, Remigius Grab and Anthony Kerr as principals, and the United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound *under* the Washington Water Power Company, a corporation, in the full and just sum of Three Hundred Dollars (\$300.00), lawful money of the United States, to be paid to it and its successors and assigns to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators jointly and severally by these presents. Sealed with our seals and dated this 25th day of September, 1922.

Whereas, the above named appellants have obtained, or are about to obtain, an appeal to the Supreme Court of the United States to reverse a decree of the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause;

Now therefore, the condition of this obligation is such that if the above named appellants shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect. James W. Miller. John Swendig. Remigius

Grab. Anthony Kerr. United States Fidelity & Guaranty Co., By D. M. Cathcart, Its Attorney in Fact. By F. W. Reid, Its Attorney in Fact. Attest: D. M. Cathcart. [Seal.]

The within bond is approved both as to sufficiency and form this 27th day of September, 1922. Wm. B. Gilbert, Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[File endorsement omitted.]

101 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3769.

[Title omitted.]

Præcipe.

[Filed Oct. 10, 1922.]

To the Clerk of the above-entitled court:

You are hereby requested and directed to prepare a Transcript of the Record on Appeal to the Supreme Court of the United States in the above entitled action of the following papers, records and documents and file in your office, to-wit:

1. The first 80 pages of the printed "Transcript of the Record" used in the above entitled court on the appeal from the District Court of the United States for the District of Idaho.

2. The Opinion of the above entitled court filed July 3rd, 1922, and the order of said court denying appellants' petition for rehearing and the judgment of the above entitled court made and entered on the 14th day of August, 1922.

3. Petition for appeal to the Supreme Court.

4. Order allowing appeal to the Supreme Court.

5. Assignment of Errors.

6. Bond on appeal together with approval thereof.

7. Citation on appeal to the Supreme Court.

8. Minutes of the Court.

9. This Præcipe together with your certificate attached to said Record.

102 You are hereby further requested and directed to certify to the Supreme Court of the United States all exhibits and certified copies of exhibits in said cause, including defendants' exhibits, 1 to 5 inclusive, and plaintiff's exhibits, 1 to 14 inclusive.

Dated this 5th day of October, 1922. James F. Ailshie, Solicitor and Counsel for Appellants, Residing at Cœur d'Alene, Idaho.

Received Copy of above this 6th day of October, 1922. Frank T. Post, Attorney for Appellee, Residing at Spokane, Wn.

[File endorsement omitted.]

103 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3769.

[Title omitted.]

Clerk's Certificate.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monekton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing One Hundred and Two (102) pages, numbered from and including 1 to and including 102, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to præcipe of counsel for the appellants, filed October 10, 1922, as the originals thereof remain on file and appear of record in my office, and that the same, together with the accompanying, original exhibits, marked as follows:

Plaintiff's 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14; Defendants' 1, 2, 3, 4 and 5;

constitute the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, this 16th day of October, A. D. 1921. F. D. Monekton, Clerk, By Paul P. O'Brien, Deputy Clerk. [Seal of the United States Circuit Court of Appeals, Ninth Circuit.]

104 In the United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Citation and Service.

[Filed Oct. 4, 1922.]

UNITED STATES OF AMERICA, ss:

To the Washington Water Power Company, a corporation, Appellee, and to John P. Gray and Frank T. Post, its Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington in the District of Columbia, on the 30th day of November, A. D. 1922, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit from a decree signed and filed and entered on the 14th day of August, 1922, upon the opinion of the said Court made and filed on the 3rd day of July, 1922, affirming a decree of the District Court of the United States for the District of Idaho, Northern Division, made on the 26th day of May, 1921, in favor of appellee, Washington Water Power Company, a corporation, and against appellants, John Swendig, James W. Miller, Remigus Grab and Anthony Kerr, to show cause, if any there be, why the decree rendered against the said appellants and in your favor, as in said order allowing appeal mentioned, should
 105 not be corrected and why justice should not be done in that behalf.

Witness the Honorable William B. Gilbert, Circuit Judge, a Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 27th day of September, A. D. 1922. Wm. B. Gilbert, Circuit Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Copy received this 2d day of October, 1922. Frank T. Post, Attorney for Appellee.

[File endorsement omitted.]

Endorsed on cover: File No. 29,223. U. S. Circuit Court Appeals, 9th Circuit. Term No. 673. John Swendig, James W. Miller, Remigus Grab, et al., appellants, vs. The Washington Water Power Company. Filed October 30th, 1922. File No. 29,223.

